MOTION FILED
DEC 22 19

No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

JOHN J. WALSH
Attorney for
Morality in Media, Inc.
Movant—Amicus Curiae
32 Court Street
Brooklyn, New York 11201
(212) 858-4070

PAUL J. McGEADY
475 Riverside Drive
New York, New York 10115
Of Counsel

No. 81-55

In The

SUPREME COURT OF THE UNITED STATES

Octber Term 1981

The People of the State of New York,

Petitioner,

--Against--

Paul Ira Ferber,

Respondent,

ON WRIT OF CERTIORARI TO THE

NEW YORK COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Morality in Media, Inc. hereby respectfully moves for leave to file the attached brief amicus curiae in support of the People of the State of New York

in the above matter for which certiorari has been granted and which is now pending "on the merits". The consent of the attorney for the Petitioner has been granted. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF MORALITY IN MEDIA, INC.

Morality in Media, Inc. is a New York not-for-profit, interfaith charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and Puerto Rico. It corresponds 8 times a year with over 40,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and

civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The President of Morality in Media, Inc. is Reverend Morton A. Hill,S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography"[1]

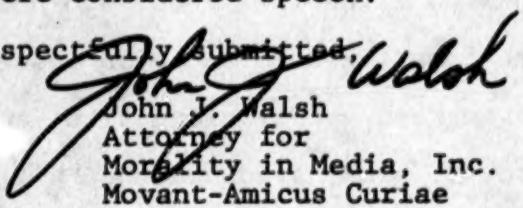
Morality in Media, Inc. files this motion and brief supporting the position of the People of the State of New York because it believes that the decision in this matter will be of grave

---

1. The "Hill-Link Minority Report" was cited by this honorable court in Kaplan v. California, 413 U.S. 115, 120n.4, 93 S.Ct. 2680, 2684 n.4, 37 L.Ed. 2d 492 (1973), and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 n.7 and n.8, 93 S.Ct. 2622 at 2635 n.7 and 8, 37 L.Ed. 2d 446 (1973).

importance to all children in the United States and to their parents. It believes that its brief contains arguments not raised by the parties, in particular its contention that such depictions are not and never were considered speech.

Respectfully submitted,



John J. Walsh
Attorney for
Morality in Media, Inc.
Movant-Amicus Curiae

TABLE OF CONTENTS

	Page
Motion of Morality in Media, Inc. to File Brief Amicus Curiae	i
Summary of Argument	2
ARGUMENT--	
I. The distribution of Pictures of Children of Tender years Engaged in Sexual Acts is not one of the Liberties protected against State Infringement by the Fourteenth Amendment	4
II. The State of New York's Right to Maintain a Decent Society Permits it to Punish the Distribution of Films and Pictures that Show Children of Tender Years Engaged in Sexual Acts if Such Depictions are Indecent	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Beauharmais v. Illinois,
343 U.S. 250 (1952).....5

Bread v. Alexandria,
342 U.S. 622 (1951).....17

Buckley v. Valeo,
424 U.S. 1 (1975).....5

California v. LaRue,
409 U.S. 109 (1972).....3

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942).....10, 18

DeJonge v. Oregon,
299 U.S. 353 (1937).....5

Ex Parte Jackson,
96 U.S. 727 (1877).....14, 16

F.C.C. v. Pacifica Foundation,
438 U.S. 726 (1978).....14

Gitlow v. New York,
268 U.S. 672 (1925).....5

Grosjean v. American Press Co.,
297 U.S. 233 (1936).....5

Kaplan v. California,
413 U.S. 115 (1973).....iii

Miller v. California,
413 U.S. 15 (1973)...3, 6, 7, 8, 11, 12, 14, 15

Moody v. Albemarle Paper Co.,
417 U.S. 622 (1974).....6

Page

Near v. Minnesota,
283 U.S. 697 (1931).....5

Palko v. Connecticut,
302 U.S. 319 (1937).....4, 7

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973)....iii, 16, 17, 20

Paul v. Davis,
424 U.S. 693 (1976).....5

People v. Donald Weiner,
N.Y.L.Jo. (11/19/81) 18 (1981).....16

Philbrook v. Glodgett,
421 U.S. 707 (1975).....6

Prince v. Massachusetts,
321 U.S. 158 (1944).....16

Robertson v. Baldwin,
165 U.S. 275 (1896).....12, 14

Roth v. United States,
354 U.S. 476 (1957).....3, 7, 8, 9, 10,
11, 13

Snyder v. Massachusetts,
291 U.S. 97 (1933).....7

Stromberg v. California,
283 U.S. 359 (1931).....5

United States v. Bennett,
24 F. Cas. 1090 (1879).....15

United States v. Bebout,
28 F. 522 (W.D.Ohio 1886).....15

Page

United States v. Chase,
135 U.S. 255 (1889).....15

United States v. Davis,
38 F. 326 (W.D. Tenn. Cir. 1889)...15

United States v. Loftis,
12 F. 671 (D. Ore. 1882).....15

Other Authorities:

Decennial Digests.....6

FBI Law Enforcement Bulletin
February 1979 12

Hill-Link Minority Report of
the Presidential Commission on
Obscenity and Pornography.....iii

Report of the Presidential
Commission on Obscenity and
Pornography.....6

Sneed, Bliss and Mosley,
"Child Pornography"
Chicago Tribune, 5/15/77.....6

"Child Pornography",
University of Ill. Law Forum,
1978 No. 3.....16

U.S. News, 6/13/77 Page 66.....16

Webster's Seventh New Collegiate
Dictionary, G & C Merrian Co.....15

"Where Do You Draw the Line",
Brigham Young University Press,
(1975).....18

No. 81-55

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

The People of the State of New York,

Petitioner,

--Against--

Paul Ira Ferber,

Respondent,

ON WRIT OF CERTIORARI TO THE

NEW YORK COURT OF APPEALS

BRIEF AMICUS CURIAE

Statement of Interest

As more fully explained in the accompanying motion, Morality in Media, Inc. is a non-profit organization dedicated to combatting obscenity, pornography and indecency in media. Morality in Media, Inc. is before the Court as

amicus curiae to urge restraint of the most debasing form of obscenity - Child Pornography.

SUMMARY OF ARGUMENT

Morality in Media, Inc. contends that the "Liberties" protected by the Fourteenth Amendment from abridgement by the states never did include and do not include the right to distribute motion pictures or other pictures depicting children of tender years engaged in sexual intercourse or other types of sexual conduct described in the New York Statute stricken by the New York Court of Appeals. If amicus is correct in this contention, it follows that there is no constitutional inhibition on the Legislature of the State of New York in enacting such legislation, provided that such

legislation is "Not Irrational".[2] Amicus contends that this qualifying test has been met.

Secondly, amicus contends that Miller v. California[3] does not restrict Congress or the States to the regulation of only that which is obscene, but that where important state interests, unrelated to expression are at stake, regulation can extend also to that which is "Indecent". Amicus contends that the regulation struck down was a proper regulation of "Indecent" material. Amicus points out that the statute struck down, in effect was also a regulation of "obscene" material even if all three prongs of Miller were not required.

---

2. Roth v. United States, 354 U.S. 476, 501 1 L.Ed. 2d 1498, 1516 (Harlan concurring in Alberts) (1957); California v. LaRue, 409 U.S. 109, 118, 34 L.Ed. 2d 342 at 352.

3. 413 U.S. 15, 37 L.Ed. 2d 419 (1973).

ARGUMENT

I

THE DISTRIBUTION OF PICTURES OF CHILDREN OF TENDER YEARS ENGAGED IN SEXUAL ACTS IS NOT ONE OF THE "LIBERTIES" PROTECTED AGAINST STATE INFRINGEMENT BY THE FOURTEENTH AMENDMENT

The lower Court opinion of the extent to which the First Amendment applies presents a strange anomoly. Since the First Amendment applies only to Congress, support for its view must be found in the provision of the Fourteenth Amendment which protects the "Liberties" of the people against infringement by the states.[4] The New York Court of Appeals has in effect decided that the freedom to distribute pictures or motion pictures of children engaged in sexual acts is one of

---

4. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

these "liberties". It is clear that no support for this view can be found in the Fourteenth Amendment itself nor in the Supreme Court cases interpreting the nature of that liberty.[5]

The myopia revealed in the

---

5. "The freedom of Speech which the First Amendment safeguards against encroachment by Congress" is within the concept of oredered liberty protected against restraint by the states. DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 672 (1925); Stromberg v. California, 283 U.S. 359, 368; Near v. Minnesota, 283 U.S. 697, 707; Beauharmais v. Illinois, 343 U.S. 250, 258 (1952); Grosjean v. American Press, 297 U.S. 233, 243, 244; Buckley v. Valeo (Rehnquist), 424 U.S. 1, 291; Paul v. Davis, 424 U.S. 693, 713 (1976).

It should be noted that the Fourteenth Amendment, which is the basis for the lower court's belief that there is a "freedom" therein protected to distribute pictures of children masturbating, was passed by Congress in 1866 and ratified in 1868 but child pronography is a decadence that was nonexistent prior to 1970.

Lower Court opinion results from a doctrinaire application of Miller v. California. The assumption is made that no Court, not even the Supreme Court, nor any legislative body will ever be able to discover or prohibit any other forms of

---

The Report of the Presidential Commission on Obscenity and Pornography in 1970 said at Page 115, "The taboo against peodophilia, however, has remained almost inviolate. The use of pre-pubescent children in stag films is almost non-existent". See also "Child Pornography" by Sneed, Bliss and Mosely, Chicago Tribune, May 15, 1977. The Supreme Court is not at liberty to engraft upon a statute or the constitution, a meaning inconsistent with its historical limitations. Cf. Moody v. Albemarle Paper Co., 417 U.S. 622, 626, 41 L.Ed. 2d 358 (1974). The object of the Supreme Court in construing legislation is to give effect to the legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713, 44 L.Ed. 2d 525 (1975). Terms used in a constitutional amendment should be interpreted in accordance with the meaning they had at the time the Amendment was adopted. (Cf. Decennial Digests, "Constitutional Law", Key 19). To abolish the right to distribute pictures of children masturbating is not to violate the principle of "ordered liberty" since

expression not covered by the three pronged Miller test from here to eternity.

Snyder v. Massachusetts, 219 U.S. 97 at 114 (1933) warns us that "a fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form...Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence".

It is helpful under such a state of facts to study the Roth-Alberts decision where the Supreme Court first made a definitive ruling that while obscenity is an "utterance" it is "not within the area

---

since such abolition would not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". (See Palko v. Connecticut, 302 U.S. 319 at 325 (1937).

of constitutionally protected speech or press". Amicus says that it is demonstrable that the same analysis that persuaded the Roth Court that such utterances have never been within the area of constitutionally protected speech or press will impel this Court to "find" that the distribution of motion pictures and pictures of children of tender years engaged in sexual acts is not within the area of constitutionally protected speech or the press regardless of whether such depictions meet the Miller three-pronged obscenity definition.

Roth throws light on the meaning of the word "liberty" used in the Fourteenth Amendment in so far as liberties of free speech and the press are concerned when it is said:

> "The protection given speech and press was fashioned to assure unfettered interchange

> of ideas for the bringing about of political and social changes desired by the people."[6]

No clearer exposition that pictures of children engaged in sexual conduct is not an "interchange of ideas for the bringing about of political and social changes desired by the people" may be found than Roth's citation of a letter of The Continental Congress. At 1 L.Ed. 2d 1506 that Court said of the above concept that:

> "This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
>
> 'The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal

---

6. 354 U.S. 476, 484, 1 L.Ed. 2d 1506 (1957).

> sentiments on the administration of Government'..."[7]

Can it conceivably be argued that the distribution of the pictures or films we have described advances truth, science, morality, the arts or political thought? --Of course not! They fall into that area described in Roth[8] and Chaplinsky v. New Hampshire[9] as

> "...Utterances" (that) "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..."

Roth indicated that the freedom of speech and the press to be protected

---

7. 354 U.S. 484, 1 L.Ed. 2d 1506 (1957).

8. 354 U.S. 485, 1 L.Ed. 2d 1507 (1957).

9. 315 U.S. 568, 571, 572, 86 L.Ed. 1031, 1035 (1941).

was 'for material which does not treat sex in a manner appealing to prurient interest.'[10]

Is anyone prepared to argue that the commercial distribution of pictures showing children engaging in sexual acts is not material designed and deliberately marketed to appeal to the interest in pruriency regardless of the fact that that requirement is not specifically set out in the statute or that proof of lack of serious value not specifically required?"[11] Certainly Roth intended to

---

10. 354 U.S. 486, 1 L.Ed. 2d 1508 (1957).

11. Miller v. California, in footnote 2 includes among the definitions of obscene that which is "Disgusting to the senses", "Grossly repugnant to the generally accepted notions of what is appropriate", "Offensive or revolting", "Offensive to the senses, or to taste or refinement", "Disgusting", "Repulsive", "Filthy", "Abominable", "Loathsome"--The Ferber material fits all of these definitions and is "obscene" under the definition of that term cited in

bar such material. Miller did not deign to change or overrule Roth or its philosophical underpinning.

The Miller Court, at 413 U.S. 34, said:

> "In our view, to equate free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment."

A fortiarari is not the First Amendment demeaned when it is cited as a defense to the distribution of debasing depictions of young children regardless of the Miller formulation?[12]

The case of Robertson v. Baldwin,

---

the Miller footnote.

12. "The majority of children recruited into this business range in age from 9 to 14 years..the majority of contacts in Kiddie Porn...are young boys. (F.B.I. Law Enforcement Bulletin, February 1979 "Child Pornography" Page 18 et seq.

165 U.S. 275 (1896) quoted with approval in Roth is dispositive when it said at Page 281:

> "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill or Rights, were never intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors and which from time immemorial been subject to certain well recognized exceptions... which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals..."

ARGUMENT

II

THE STATE OF NEW YORK'S RIGHT TO MAINTAIN A DECENT SOCIETY PERMITS IT TO PUNISH THE DISTRIBUTION OF FILMS AND PICTURES THAT SHOW CHILDREN OF TENDER YEARS ENGAGED IN SEXUAL ACTS IF SUCH DEPICTIONS ARE INDECENT.

It should be noted that the Supreme Court of the United States subsequent to Miller found no difficulty in upholding 18 U.S.C. 1464 wherein Congress has proscribed "Indecent" material which was not obscene.[13] The government interest therein protected was the invasion of the privacy of the home bolstered by a

---

13. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 57 L.Ed. 2d 1073 (1978); Nor did the Supreme Court in the past have any difficulty supporting police power to forbid the "indecent" as well as the obscene. See United States v. Chase, 135 U.S. 255, 261 (1889); Ex Parte Jackson, 96 U.S. 727, 737 (1877); Robertson, supra.

limited concern for minors. This decision clearly refutes the generality that media content can be proscribed only if Obscene. What New York has done is to proscribe a species of conduct which if not obscene under Miller certainly fits the definition of "Indecent". In Pacifica the Supreme Court of the United States defined that term as "Non-Conformance With Accepted Standards of Morality"[14] If Congress, post Miller, can

---

14. Other definitions of indecent include "calculated to promote the general corruption of morals", United States v. Bennett, 24 F. Cas. 1093, 1102 (S.D. N. Y. Cir.) (1879); "Something unfit for the eye or ear", United States v. Loftis, 12 F. 671, 672 (D.Ore. 1882); "Unfit to be seen or heard", United States v. Bebout, 28 F. 522, 524 (W.D.Ohio 1886); "That which shocks the ordinary and common sense of men as indecency", United States v. Davis, 38 F. 326, 328 (W.D. Tenn. Cir.)(1889); "Great unseemliness or gross offensiveness, especially in relation to sexual matters", Webster's Seventh New Collegiate Dictionary, G & C Merrian Co.).

regulate material that is indecent but not obscene, so too can the states where there are important state interests at stake. These obvious interests are the well-being of children,[15] the prevention of their sexual exploitation[16] and the state's interest in morality.[17]

---

15. Prince v. Massachusetts, 321 U.S. 158 (1944). "Testimony has been offered that between January 1976 and June 1977 as many as 300,000 children have been subject to sexual exploitation nationally", "Child Pornography", U. S. News, June 13, 1977.

16. It is to be noted that this is an "Imortant governmental interest" that is furthered that is "Unrelated to the suppression of free expression". Cf. People v. Donald Weiner, N.Y.L.Jo., November 19, 1981, Page 18, Col. 6 construing Section 263.05 of the Penal Code. Since "free speech", however, is not at issue it is not necessary to examine whether a "compelling" state interest is involved. Cf. "Child Pornography", U. of Ill. Law Forum, 1978 No. 3, Pages 741, 742.

17. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61; Ex Parte Jackson, 96 U.S. 727, 736 (1877).

Various of the governmental interests spelled out to justify the validity of Obscenity legislation, are equally applicable to "Indecent" depictions of chilren engaged in sexual acts. These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and possibly the public safety itself. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58.

"Rights and interest other than the advocates are involved". Cf. Bread v. Alexandria, 342 U.S. 622 (1951).

Slaton quotes Professor Alexander Bickel to the effect that

> "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear...what is commonly read and seen and heard and sone intrude upon us all, wanted or not"[18]

---

18. 413 U.S. 49 at 59.

Professor Bickel in 1974, writing in Where Do You Draw The Line,[19] elaborated on this thought when he wrote:

> "Even speech, which advocates no ideas, can have its consequences. It may inflict injury by its very utterance as the Court said a generation ago in the Chaplinsky case of lewd or profane or fighting words. More and equally important, it may create a climate, an environment in which conduct and actions that were not possible before, became possible."

How prophetic are these words!

Irving Kristol writing in the same publication[20] puts it thus:

> "What is at stake is civilization and humanity, nothing less...the matter of obscenity and pornography is not a trivial one." (Emphasis added)

---

19. Brigham Young University Press, Edited by Victor B. Cline (1974) at page 72.

20. Id. at Page 51.

It is also quite apparent from this exposition that where the welfare of children is a consideration, a perception by the legislature of the State of New York that that welfare is advanced by this law is not "irrational".

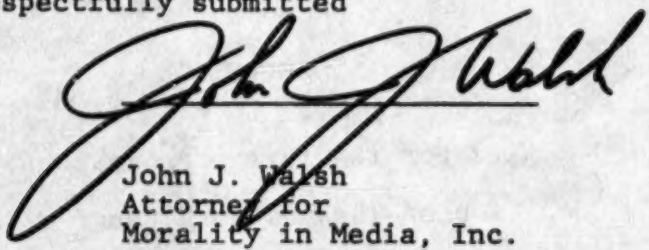
CONCLUSION

For the foregoing reasons, the decision of The New York Court of Appeals is erroneous and should be reversed. It is an abomination to suggest that a film depicting children of tender years being exploited by having them engage in sex for the titillation of sick adults must be examined for lack of serious value. Is it to be the rule that an "artistic" depiction of such children will save it from proscription or that it must be "considered as a whole"? No. - Such a picture has the status of self-proving

pornography - Res Ipsa Loquitor and any civilized society must condemn it out of hand. Paris Adult Theatre I v. Slaton, supra, reminds us that the State has a right to maintain a "Decent Society".

DATED December 21, 1981

Respectfully submitted



John J. Walsh
Attorney for
Morality in Media, Inc.
Movant-Amicus Curiae
32 Court Street
Brooklyn, New York 11201
(212) 858-4070

CERTIFICATE OF SERVICE

I hereby certify that on the day of December 1981, three (3) copies of the annexed motion for leave to file a brief Amicus Curiae and Amicus Curiae brief were mailed, postage prepaid, to:

(1) Robert M. Morgenthau,
District Attorney
New York County
Attorney for Petitioner
155 Leonard Street
New York, New York 10013

and

(2) Herald Price Fahringer, Esq.
Attorney for Respondent
540 Madison Avenue
New York, New York 10022.

I further certify that all parties required to be served have been served.

John J. Walsh
32 Court Street
Brooklyn, New York 11201
Attorney for Morality In Media, Inc.
Movant-Amicus Curiae